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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

UNIVERSITY OF CINCINNATI, *et al.*, Petitioners,

v.

JOHN B. JOHNSON, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent served as the senior personnel officer for a public university and claims that he was dismissed because he advocated more vigorous implementation of the university's affirmative action policies. This petition presents three questions arising from this claim:

I.

Whether the First Amendment prohibits a government agency from discharging a senior officer, who reports directly to the agency's head, on the ground that the officer questioned the agency's commitment to its own policies.

II.

Whether Title VII or Section 1981 prohibits the discharge of an employee for advocating that the employer increase its efforts at affirmative action.[1]

III.

Whether it is unlawful retaliation under section 704 of Title VII to dismiss a senior personnel officer who files a charge that the employer violated Title VII by undermining the officer's efforts to promote affirmative action.

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[1] "Title VII" and "Section 1981" are, respectively, the common terms for Title VII of the Civil Rights Act of 1964 and section one of the Civil Rights Act of 1866, which is codified at 42 U.S.C. § 1981. *See* pages 1-2, *infra*.

PARTIES

John B. Johnson was the plaintiff in the district court, was the appellant in the court of appeals, and is respondent here.

The three petitioners here, who were defendants in the district court and appellees in the court of appeals, are: the University of Cincinnati; its President, Dr. Joseph A. Steger; and its Senior Vice-President and Provost for Health Affairs, Dr. Donald C. Harrison.

The University of Cincinnati is an instrumentality of the State of Ohio.

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The Attorney General of Ohio—on behalf of the University of Cincinnati; its President, Dr. Joseph A. Steger; and its Senior Vice-President and Provost for Health Affairs, Dr. Donald C. Harrison—respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-53a) is reported at 215 F.3d 561. The opinion of the district court (App. 55a-89a) is unreported.

JURISDICTION

The judgment of the court of appeals was issued on June 1, 2000, and rehearing was denied on August 9, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits States from "abridging the freedom of speech."

2. Section one of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, and commonly referred to as "Section 1981," provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other."

3. Section 703 of the Civil Rights Act of 1964, Title VII, codified at 42 U.S.C. § 2000e-2(a)(1), provides: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

4. Section 704 of Title VII, codified at 42 U.S.C. § 2000e-3(a), provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

STATEMENT

This case raises important questions concerning the ability of a government agency to dismiss a senior officer, who reports directly to the agency's head, when the officer expresses his view that the agency is not fulfilling its own policy commitments. A divided panel of the court of appeals has held that, if a public university dismisses a senior official for disagreeing with the university and its president concerning implementation of its affirmative action policy, the dismissal violates the First Amendment as well as Title VII and Section 1981. That holding is contrary to the decisions of other courts of appeals, and, if left unreviewed, will impede the effective management of public agencies generally (and also private employers under Title VII and Section 1981).

1. Background.

The University of Cincinnati (a public institution) maintains an affirmative action program. In 1993, the University appointed respondent John B. Johnson to serve as Vice-President of Human Resources and Human Relations, a position that included responsibility for implementing the University's affirmative action policies. Johnson reported directly to the University's President and served on the President's cabinet.

In 1996, the University discharged Johnson from his position. The parties dispute the reason. The University maintains that it discharged Johnson because of his inability to work effectively with other University administrators, including his improper handling of important labor negotiations. Johnson claims that he was discharged "because of his advocacy on behalf of protected minorities and his support of policies and programs that promoted cultural diversity." Complaint ¶ 1 (App. 90a).

As the case comes to this Court, it is necessary to accept Johnson's allegations as factually accurate. The district court granted summary judgment against Johnson, ruling that his allegations failed to state a claim under Title VII, Section 1981 or the First Amendment. The court of appeals reversed and remanded the case for trial, holding that Johnson's factual allegations, if true, do constitute cognizable federal claims.

2. The District Court Proceedings.

In December 1995, while still serving as the University's senior personnel officer, Johnson filed a formal charge with the EEOC, in which he alleged that he was being obstructed in his efforts to promote affirmative action, especially at the University Hospital. After he was removed from his position in early 1996, he filed this action in federal district court, claiming that he was

dismissed both for his advocacy of increased affirmative action and in retaliation for filing his EEOC charge.

The district court granted summary judgment, dismissing all of Johnson's claims. The district court ruled that, as a matter of law, discharging an employee for advocating an increase in affirmative action is not a violation of either Title VII or Section 1981. App. 73a-74a. As the district court reasoned, because affirmative action is not required by Title VII or Section 1981, the University did not violate either provision. The court explained that, although Johnson "protested when the University failed to hire minorities for the positions of Senior Executive Office[r] for University Hospital and for a University Provost position," Johnson "did not protest that the failure to hire these persons was itself a violation of Title VII." App. 73a.[2]

With regard to Johnson's claim that the University retaliated against him for filing his EEOC charge, the district court explained that Johnson was required to have a "reasonable" belief that the University's conduct to which he objected was unlawful under Title VII, and the facts even as Johnson alleged them would not permit a jury to find that he reasonably believed he was objecting to a Title VII violation. App. 77a-78a. As the district court observed, Johnson was the University's highest-ranking officer in charge of employment matters, with an extensive background in the field. Thus, as a matter of law, it would not have been reasonable for someone in Johnson's position to believe that deficiencies in the implementation of an affirmative action plan amounted to a violation of Title VII itself. App. 79a. Accordingly, the

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[2] In his EEOC charge, Johnson also included a generalized assertion, without details, that his authority was being undermined because of his own race (African-American), but in the district court he abandoned this allegation. As the district court noted, his own race is irrelevant to the claims he makes in this lawsuit. *See* App. 72a, 78a n. 4.

district court ruled that the University was entitled to summary judgment on Johnson's retaliation claim.

The district court also rejected Johnson's First Amendment claim. Applying the analysis articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the district court found that Johnson's criticism of the University regarding affirmative action was a matter of public concern, but went on to declare that it was "causing a tremendous disruption" of the University's operations and thus was unprotected. App. 86a. The district court also observed that difficulties between Johnson and other University administrators, including its President, had reached a point where hiring at the University had become significantly delayed. *See* App. 85a-86a.

3. The Court of Appeals Decision.

The Court of Appeals, in a divided opinion, reversed and remanded for a trial on Johnson's Title VII, Section 1981, and First Amendment claims. The panel majority held that Title VII and Section 1981 both provide a cause of action for an employee who alleges that his employer discharged him for advocating that the employer increase its affirmative action efforts. Given that Title VII and Section 1981 were enacted to protect minorities and women against discrimination, the majority concluded, any workplace advocacy on behalf of these protected groups was itself protected under Title VII and Section 1981. *See* App. 28a.[3]

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[3] The majority pronounced it "clear that a Caucasian high-level affirmative action official could bring a claim under [Title VII and Section 1981] for discrimination based upon his advocacy on behalf of minorities[,] because the discrimination would be 'because of such individual's race,' where the race of the minorities for which he was advocating would be 'imputed' if you will to the Caucasian high-level affirmative action official." App. 22a.

The majority also ruled that Johnson stated a valid retaliation claim by alleging that he was dismissed for filing his EEOC charge. Contrary to the district court, the court of appeals held that Johnson, a high-level personnel officer, reasonably could have believed that he was seeking redress for a Title VII violation when he was protesting perceived deficiencies regarding affirmative action. App. 38a. Accordingly, the court of appeals remanded Johnson's retaliation claim for a determination whether his dismissal was caused by the filing of his EEOC charge.[4]

Finally, the majority reinstated Johnson's First Amendment claim. In its own application of the *Pickering* analysis, the majority rejected the district court's determination that Johnson's advocacy concerning affirmative action was necessarily disruptive to the University. App. 42a. "Even if Plaintiff's speech delayed the University's hiring of prospective employees, this does not rise to the level of having a detrimental impact on close working relationships or undermining a goal or mission of the University." App. 45a. Then the majority expressed its belief that Johnson's advocacy actually "promoted or advanced the University's alleged goal of employment equality for women and minorities [and] did not undermine that goal." *Id.*

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[4] Johnson's retaliation claim is based on Section 704 of Title VII, whereas his "advocacy" claim is based on section 703. His retaliation claim is further divided into two analytically distinct subclaims: first, an "opposition" subclaim insofar as Johnson claims retaliation for opposing what he perceived as insufficient affirmative action; and second, a "participation" subclaim insofar as he claims retaliation specifically for filing his EEOC charge. The court of appeals reinstated the "opposition" subclaim based on its view that protesting perceived deficiencies in affirmative action counts as protected "opposition" under section 704. App. 34a. (By contrast, the district court had rejected Johnson's "opposition" subclaim for the same reason it had rejected his "advocacy" claim under section 703. App. 76a.)

In her partial dissent, Judge Kennedy objected that the majority's analysis of Johnson's "advocacy" claims under Title VII and Section 1981 was "fundamentally flawed." App. 50a. She observed that "[p]laintiff's claim against the University and its employees basically boils down to a disagreement over the implementation of an affirmative action program." App. 50a. She stressed that the majority missed the key distinction between this case and one in which an employee is disciplined for "advocating upon the behalf of a specific individual or specific individuals whose constitutional rights or Title VII rights have been violated." *Id.*

Thus, Judge Kennedy would have affirmed summary judgment against Johnson on his "advocacy" claims under Title VII and Section 1981. Judge Kennedy, however, agreed with the majority that Johnson's retaliation claim should be remanded for trial insofar as it alleges that he was dismissed for filing the EEOC charge. Without specifically considering the predicate question whether Johnson had a "reasonable" belief that the University was violating Title VII, Judge Kennedy favored a liberal construction of the participation clause of section 704 and noted that "his termination occurred in close proximity to his filing of an EEOC claim." App. 51a-52a.

In her dissent regarding Johnson's First Amendment claim, Judge Kennedy reasoned that the *Pickering* analysis must take into account those situations where, as here, it is the very nature of a high-level public officer's job to speak on matters of public concern. App. 52a-53a. Specifically, when the senior officer for human resources speaks on the topic of affirmative action, in the course of performing the duties for which he was hired, the University is entitled to expect that his speech will be consistent with the its own views, as formulated by its President and Board of Trustees. Therefore, Judge Kennedy would have affirmed

summary judgment on the First Amendment claim as well.[5]

REASONS FOR GRANTING THE PETITION

In this petition, we present three questions for the Court's review. One concerns the Sixth Circuit's First Amendment holding. The second concerns Johnson's "advocacy" claim under Title VII and Section 1981. The third concerns Johnson's retaliation claim under section 704 of Title VII, specifically as it relates to his EEOC charge. All three questions are worthy of this Court's attention, and we start with the First Amendment question because it is broadest in scope and presents the most well-developed conflict among the courts of appeals.

I. This Court should settle the circuit conflict concerning what First Amendment test applies when a public agency dismisses a high-level official for expressing a disagreement on a policy matter.

A. This Court's precedents have left this important First Amendment issue unresolved.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court adopted a balancing test for determining whether the First Amendment is violated if a government employee is dismissed because of something

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[5] Johnson's complaint also included pendent state law claims, which the district court in its discretion declined to consider. The court of appeals, however, revived the state law claims based on Ohio's analogue to Title VII. *See* App. 14a n. 4. If this Court grants certiorari and reverses the Sixth Circuit's interpretation of Title VII, then on remand the district court's dismissal of these analogous state-law claims may be reinstated.

the employee has said. The *Pickering* test calls for a case-by-case weighing of an employee's interest in speaking on "matters of public concern" against the government employer's interest in maintaining "efficiency" in its operations. *Id.* at 568. As subsequently refined, the requirement that the employee's speech address a topic of public concern is a threshold inquiry, but once this threshold is met, each case under *Pickering* requires a particularized balancing of the competing interests at stake. *See Connick v. Myers*, 461 U.S. 138 (1983); *see also Rankin v. McPherson*, 483 U.S. 378 (1987).

In *Pickering* itself, as well as in subsequent cases, the Court has suggested that particularized balancing may not be necessary when a high-level officer, or other confidential employee, is dismissed for speech that the agency deems inconsistent with the successful operation of its mission. *See Pickering*, 391 U.S. at 570 n. 3 (where "relationship between superior and subordinate" is sufficiently "personal and intimate," the relationship may become untenable if the subordinate persists in criticizing the superior). *See also Connick*, 461 U.S. at 151-52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."). Instead, when a high-level officer criticizes the policies or priorities of the agency for which he works, the agency should be permitted to dismiss the officer without judicial second-guessing. Putting this common-sense point vividly, "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality).

Branti v. Finkel, 445 U.S. 507 (1980), supports this point. There, the Court confirmed that individuals serving in some kinds of high-level or confidential public positions may be dismissed solely because of their

political affiliation. As the Court has described this proposition of First Amendment law, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti,* 445 U.S. at 518. Although some case-by-case balancing may be necessary to determine whether a particular position is indeed an "appropriate" one for a requirement of party affiliation, once that determination is made there is no further balancing of the employee's First Amendment interests against the government's interest in effective administration. In *Branti* the Court invoked the same example of a State's governor to make clear that the governor may insist that his top aides share his political affiliation, without any judicial review of the strength of the governor's interests in a particular case. *Id.* ("[T]he Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.")

In its *Pickering* line of cases, this Court never has had occasion to decide definitively whether the categorical rule adopted in *Branti* applies when a high-level or confidential employee is dismissed, not for political affiliation, but instead for criticizing his public employer's policies or priorities. *Pickering* involved a teacher, *Waters* a nurse, and *Rankin* a clerical employee. *Connick* involved an assistant district attorney, which might be a position that falls within the *Branti* category (*see* 445 U.S. at 519 n. 13), but the Court did not need to address that question, because the speech for which she was dismissed largely did not involve a matter of public concern and the

little that did clearly threatened to undermine office relations. *See* 461 U.S. at 152-54.[6]

Thus, this case presents an important question of First Amendment law that has remained undecided since *Pickering*.

B. The circuits are sharply divided on the application of *Pickering* to high-level public officials.

The federal courts of appeals are deeply divided concerning the proper test to apply in a case like this one, where a high-level or confidential public employee is dismissed for criticizing the agency's implementation of its own policies. The D.C., First, Seventh, and Ninth Circuits have all held, relying on *Branti*, that there should be no particularized balancing of competing interests once it is determined that the public employee

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[6] In *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), this Court remanded the case to the court of appeals to decide whether *Branti* or *Pickering* should apply when a city refuses to do further business with an independent contractor because the contractor supported the mayor's opponent in a recent election. The purpose of this remand, however, was to leave open the possibility that the city might prevail under a *Pickering* balance. Since an independent contractor would not qualify as a high-level or confidential employee for which a political affiliation requirement would be "appropriate," application of *Branti* in that case would result automatically in a finding of a First Amendment violation. The case-by-case balancing of *Pickering*, by contrast, would permit consideration of the need to accord "government the discretion it requires in the administration and awarding of contracts over the whole range of public works and the delivery of government services." *Id.* at 719-720. Thus, *O'Hare* did not involve the First Amendment question presented here, which concerns the proper analysis in a case involving a high-level officer.

who has criticized the agency is properly identified as holding a policy-level position. *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988); *Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir.), *cert. denied*, 525 U.S. 961 (1998); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995); *Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997). By contrast, the Second, Fifth, and Tenth Circuits have all held the opposite: that, although an employee's high-level or confidential position is a factor to be considered when conducting the *Pickering* balancing test, case-by-case consideration still must be given to the strength of the employee's interest in criticizing the agency. *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir.), *cert. denied*, 120 S.Ct. 70 (1999); *Kinsey v. Salado Independent School Dist.*, 950 F.2d 938 (5th Cir. 1992) (en banc); *Curtis v. Oklahoma City Public Schools Bd. of Educ.*, 147 F.3d 1200, 1213-14 (10th Cir. 1998).

In a leading case with facts very similar to this one, the D.C. Circuit ruled that the athletic director of a public university could not state a First Amendment claim on the ground that he was dismissed because he expressed the view that the university's athletic department was not in compliance with NCAA rules concerning student-athletes. *Hall*, 856 F.2d at 264. Invoking *Branti*, the court announced a general rule that an employee with responsibility for making or implementing policy may be dismissed for expressing a disagreement with his employer concerning the policies for which he is responsible. *See id.* As the court explained:

> "High-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their superiors' policies, and perceived by the public as sharing their superiors' aims; this is true whether or not those officials are elected."

Id. at 263.

Applying this rule, the D.C. Circuit determined that the position of athletic director qualified as a "prominent policy level official," from whom the university's president and board could insist upon loyalty and agreement on policy matters. *Id.* The athletic director reported directly to the university's president and board, "and they were his only superiors." *Id.* at 265. Consequently, because the athletic director's views concerning "how the department should have been run were obviously at odds with those of the Board," this individual could be dismissed for expressing these views, without further First Amendment inquiry. *Id.*

Specifically citing *Hall* and its reliance on *Branti*, the First Circuit has adopted the same rule of First Amendment law. *Flynn*, 140 F.3d at 47 ("[W]here the employee is subject to discharge for political reasons under [*Branti*], a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position."). That case, also factually similar to this one, involved two associate directors of a city's social services agency, both of whom alleged that they were discharged for protesting various personnel-related matters within the agency. Both of these officials reported directly to the agency's executive director, and both were part of the agency's "top management" responsible for making and implementing the agency's policies. One was associate director for administration and finance and, like Johnson here, specifically had "authority over human resource issues." *Id.* at 45. (The other was associate director for field operations.)

Because both allegedly were dismissed for their speech "relat[ing] to the operation of the office (primarily to matters of hiring, firing and discipline)," their dismissal from these senior management positions was unprotected even if their speech might qualify as a "matter[ ] of public concern" under *Pickering* and *Connick*.

Id. at 47. Given the job-related nature of their speech, the agency's executive director (without further First Amendment balancing) "was permitted to conclude reasonably that she did not have the necessary trust and confidence to retain them." *Id.*[7] Thus, the First Circuit's decision in *Flynn*, like the D.C. Circuit's in *Hall*, is flatly inconsistent with the Sixth Circuit's decision in this case. *See also Warzon*, 60 F.3d at 1239 (7th Cir.) (dismissal of county comptroller for criticizing county's health care plan did not violate the First Amendment because comptroller was a policymaker with specific responsibility for administering this plan);[8] *Weisbuch*, 119 F.3d at 783 (9th Cir.) (demotion of county's medical director for disagreeing with health department's policies on managed care was permissible because this disagreement, from a high-level employee, necessarily would impair department head's confidence).[9]

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[7] Judge Gibson, sitting by designation, disagreed with the First Circuit majority and would have remanded the case for an application of the particularized balancing test under *Pickering* and *Connick*, so that the dismissed associate directors could attempt to show that their interest in expressing their views outweighed the agency's interests in efficient administration of the office. *Id.* at 51.

[8] *Accord Ryan v. Illinois Dept. of Children and Family Serv.*, 185 F.3d 751, 759 (7th Cir. 1999) (applying same categorical rule to dismissal of administrators for criticism of their agency's policies).

[9] Moreover, in a case with facts noticeably similar to this one, the Ninth Circuit rejected the First Amendment claim of the affirmative action officer at a local community college who alleged that she was dismissed because she criticized the college's affirmative action program. *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996). Affirming summary judgment against the plaintiff, the Ninth Circuit explained that it necessarily is insubordination when a college's affirmative action officer, who reports directly to the college's president, disobeys the president's directives concerning

Conversely, the Second, Fifth, and Tenth Circuits, like the Sixth Circuit here, have applied particularized balancing to challenges by policymaking employees claiming to suffer adverse employment action because of policy disputes with their superiors. Expressly rejecting a *Branti*-like categorical rule for this context, the Second Circuit has declared that "a policymaking employee may be discharged on the basis of political affiliation," but the "same employee may not be discharged on the basis of specific speech on a matter of public concern unless the *Pickering* balancing test favors the government employer." *Lewis v. Cowen*, 165 F.3d at 162 (head of state lottery dismissed for policy dispute concerning lottery size).[10] *See also Kinsey*, 950 F.2d at 994-96 (5th Cir.) (applying *Pickering* balancing test to dismissal of school superintendent);[11] *Curtis*, 147 F.3d at 1213-14 (10th Cir.) (sustaining, in part, the First Amendment claim of a school district's "Equity/Affirmative Action Officer" who disagreed with the district concerning the specific emphasis of its equity efforts).[12]

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affirmative action. *Id.* at 1081. *Accord Hamm v. Board of Regents*, 708 F.2d 647, 653 (11th Cir. 1983).

[10] Judge Weinstein (sitting by designation), however, would have applied the *Branti* rule, so as to avoid inappropriate judicial scrutiny of policy disputes within the upper ranks of a public agency. *Id.* at 168-169 (separate concurrence).

[11] *But see id.* at 998 (Higginbotham, with Politz, Garwood and Davis, J.J., concurring specially):

> "When . . . a policymaker is fired because of views related to his mission, there is no further weighing, whether or not these views have been publicly espoused. In a practical sense, the balances have already been struck by the categorization of a worker as a policymaker."

[12] *See also Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000) (applying *Pickering*, rather than *Branti*, to the dismissal of a "confidential" administrative assistant who spoke to a reporter about official matters, and ruling the dismissal unjustified under *Pickering*).

As we next explain, this application of case-by-case balancing to senior-level policy disputes is judicial supervision of management decisions, which seriously intrudes on the ability of an agency to exercise its own judgment in making policy choices.

C. Resolution of this circuit conflict is necessary to uphold the authority of public agencies to dismiss senior administrators who disagree with their agencies on policy matters.

In this case, the majority of the Sixth Circuit panel rejected the University's argument (which had been accepted by the district court) that it was inherently disruptive to have the University's senior personnel officer disagreeing with the President over how best to implement the University's affirmative action plan. The panel majority instead said this criticism would actually help the University achieve its goal of improving opportunities for minorities and women. App. 45a-46a. But in so stating, the panel majority impermissibly substituted its judgment for that of the University's President and Board.

The University was entitled to believe that its interests would be better served by having its affirmative action plan implemented in a manner that was sufficiently flexible to accommodate other important University objectives, including timely hiring of top candidates to fill crucial vacancies at the University's hospital. Once the University perceived that its chief personnel officer was interfering with these objectives by questioning its commitment to affirmative action, the University was entitled to replace its chief personnel officer with someone who would more readily support the University's own views. The University, moreover, was entitled to make this administrative judgment without judicial second-guessing of the kind that occurred in the

Sixth Circuit here. Simply put, the First Amendment should not be construed to stand in the way of a public agency that replaces a senior officer because the officer has criticized the agency as deficient in the implementation of its policies.[13]

II. This Court should review the Sixth Circuit's holding, inconsistent with circuit law elsewhere, that federal legislation protects workplace advocacy of affirmative action.

A. Section 703 of Title VII prohibits employment-related discrimination against any individual "because of such individual's race." Section 704 of Title VII prohibits discrimination against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter." Thus, it is a violation of Title VII to discriminate against an employee because he has opposed an employer's hiring decisions that are themselves discriminatory under section 703. For example, if a white airline pilot is fired because he complains that the airline refuses to hire black pilots, the white pilot would have a valid claim under the opposition clause of section 704 of Title VII.

An employer's failure to adopt an affirmative action plan, however, is not a violation of Title VII, and neither is the failure to implement an existing plan as vigorously as some might like. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981)

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[13] Although this case involves only internal criticism of a public agency by one of its top officials—and some circuit courts, as well as Judge Kennedy in dissent here, have considered this fact significant—the rule we would urge the Court to adopt would encompass both internal and public criticism of an agency by a senior official. In this respect, our proposed rule would encompass the case of the governor's deputy who speaks publicly in criticism of the governor's policies. *See Waters*, 511 U.S. at 672 (discussed, *supra*, at p. 9).

("Title VII, however, does not demand that an employer give preferential treatment to minorities or women.").[14] Thus, opposing an employer's deficiencies in affirmative action is not opposing an "unlawful" practice under Title VII, and for this reason dismissing an employee for protesting deficiencies in affirmative action is not an actionable offense under the opposition clause of section 704. Nor, quite obviously, is dismissing an individual for advocating affirmative action a form of discrimination against *either* that particular individual *or* any other individual "because of such individual's race" within the meaning of section 703 of Title VII.

B. Section 1981 is no more hospitable to Johnson's advocacy claim. This provision, first adopted as section one of the Civil Rights Act of 1866, guarantees blacks and whites "the same right . . . to make and enforce contracts." It, too, does not require affirmative action. *Cf. Patterson v. McLean Credit Union,* 491 U.S. 164 (1989).

Johnson argued, and the Sixth Circuit agreed, that this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), supports holding employers liable under Section 1981 if they adversely treat an employee for advocating affirmative action. But that contention is incorrect. *Sullivan* permitted a white landowner to sue under the Civil Rights Act of 1866

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[14] Indeed, Title VII specifically so states:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

42 U.S.C. § 2000e-2(j).

(Section 1982 specifically) because he was expelled from a racially restrictive property owners' association after attempting to assign his interest in the property to an African-American. In that case, the racial restriction that the white owner was protesting was clearly prohibited by the Civil Rights Act, and thus it made sense to grant the white owner standing to remedy this violation of the statute. But there is simply no suggestion from this Court, in *Sullivan* or elsewhere, that such third-party standing would extend to cases where the plaintiff does not claim that anyone has suffered a civil rights violation. Thus, protesting a deficiency in affirmation action, which is not a statutory violation, cannot give rise to the kind of derivative standing recognized in *Sullivan*.[15]

C. In this lawsuit, as the district court specifically observed (*see, supra*, p. 4), Johnson does not allege that any of the University's conduct he opposed was a violation of Title VII or Section 1981. The "preliminary statement" of his complaint says that Johnson suffered "because of his advocacy on behalf of protected minorities and his support of policies and programs that promoted cultural diversity." App. 90a.[16]

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[15] In addition to *Sullivan*, the Sixth Circuit cited several circuit cases to sustain Johnson's "advocacy" claim under Title VII and Section 1981. *See* App. 19a-21a. But all of these cases, like *Sullivan*, are inapposite because they all involved racial discrimination itself, not a lack of affirmative action. *See, e.g., Tetro v. Popham*, 173 F.3d 988, 994 (6th Cir. 1999) (discrimination against father of biracial child).

[16] Throughout the complaint, there is repeated reference to the self-described "battle" that Johnson undertook "in connection with the implementation and enforcement of affirmative-action policies and practices." App. 97a. The complaint also contains some generalized allegations that Johnson opposed "disparities in hiring and pay for minority employees," App. 92a, but nowhere is there a claim that these disparities amounted to a Title VII violation. Instead, summing up the essence of Johnson's case, the complaint states that the University's President ultimately turned against Johnson for "attempting to

And Johnson's brief to the district court opposing summary judgment states:

> "This case stems from Mr. Johnson's efforts to vindicate the university's official affirmative-action polices as required by federal regulation of the Office of Federal Contract Compliance and Programs (OFCCP). Mr. Johnson was a forceful and vocal proponent of these policies. Nevertheless, Mr. Johnson was prevented from fulfilling his responsibility with respect to these policies when the university's administration effectively marginalized his authority. In response, Mr. Johnson filed a complaint of discrimination with the [EEOC]."

App. 106a-107a. Given this description of his own case, from the plaintiff himself, it should be evident that the district court was correct to grant summary judgment, as a matter of law, dismissing Johnson's "advocacy" claims under Title VII and Section 1981—and the court of appeals was wrong to reverse.[17]

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gain University's compliance with affirmative-action policies." App. 98a.

[17] In a footnote, the Sixth Circuit cited Johnson's deposition testimony that the University's President had told him in a meeting, "Faculty would kill me if I would bring in a black provost, particularly with us already having two black vice presidents at the University." App. 28a n. 7. While the University's President disputes Johnson's account of this conversation, the important point here is that Johnson has never alleged that the University or its President engaged in a Title VII violation in hiring a new provost (or otherwise). Nor, indeed, does Johnson's complaint even mention the hiring of a new provost, focusing instead on the alleged deficiencies in affirmative action at the University Hospital. Accordingly, this case comes to this Court predicated on the claim that it is enough, for purposes of Title VII and Section 1981, that Johnson opposed hiring practices that he believed were inadequate in promoting affirmative action. In seeking

D. It is important, furthermore, that this Court grant certiorari in this case to repudiate the Sixth Circuit's clearly erroneous interpretation of Title VII and Section 1981. The Sixth Circuit has effectively converted these historic civil rights statutes into a new form of free speech provision, one applicable to the private as well as public sector, and one that grants employees absolute immunity from discipline in response to speech concerning race or gender issues in the workplace. The private-sector speech protected by the Sixth Circuit's new rule, moreover, necessarily includes speech advocating *less* affirmative action (since this worker might be sticking up for co-workers who he believes are suffering from reverse discrimination). Presumably, the Sixth Circuit rule would also encompass workplace speech advocating that the employer provide more child care or family leave or "flex-time" scheduling, since such policies are often viewed as especially benefiting women in the workplace. Although there might be some policy considerations in favor of a federal law that protects this kind of private-sector speech, Congress did not enact such a law in either 1866 or 1964. The Sixth Circuit should not be permitted to rewrite either Civil Rights Act merely to conform to that court's own policy preferences regarding workplace advocacy of affirmative action.

The potential ramifications of the Sixth Circuit's decision here are even broader, considering that Title VII is a model for many other federal anti-discrimination statutes, including the Americans with Disabilities Act. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357-358 (1995). Thus, given the Sixth Circuit's decision here, it follows that a corporation's senior personnel officer may not be dismissed for urging the corporation to adopt greater accommodations for the disabled than those the ADA itself requires. Unlike the Sixth Circuit, however, the First Circuit wisely has

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certiorari on this issue, we ask this Court to review (and ultimately reject) this claim.

rejected such a view. *See Oliveras-Sifre v. Puerto Rico Dept. of Health*, 214 F.3d 23, 27 (1st Cir. 2000).

The Sixth Circuit's expansion of liability under Title VII and Section 1981 also stands in stark contrast to the Eighth Circuit's decision in *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98 (8th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996). In *Evans*, a school teacher sued under both Title VII and Section 1981, claiming that he was terminated from his position because he voiced his view that the school's implementation of a magnet program pursuant to a desegregation decree was inadequate in meeting the needs of the school's minority students. The Eighth Circuit, however, ordered dismissal of the plaintiff's claim on the ground that his allegation did not state a valid claim under either Title VII or Section 1981. As the Eighth Circuit put it, "Title VII is not a 'bad acts' statute" and thus does not protect protestations about school policies that do not involve "any allegation of a discriminatory employment practice." *Id.* at 101. The same point, the court added, applies to Section 1981. *Id. See also Jamil v. Secretary of Defense*, 910 F.2d 1203, 1207 (4th Cir. 1990) (opposing employer conduct that does not itself violate Title VII is not protected); *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) ("opposition must be directed at an unlawful employment practice of an employer," not at a co-worker's racial slur); *accord Little v. United Technologies,* 103 F.3d 956 (11th Cir. 1997).

This Court should grant certiorari here to settle the scope of protected "advocacy" under Title VII and Section 1981, as well as to resolve the circuit conflict concerning *Pickering* and policymakers.

III. This Court should resolve whether an EEOC charge by a senior personnel officer must be reasonable and, if so, whether it is unreasonable to charge that an employer violates Title VII by undermining efforts at affirmative action.

The "participation" clause of section 704 of Title VII makes it unlawful to retaliate against an employee for filing a charge or otherwise participating in an EEOC proceeding. There is no doubt that an employee may maintain a valid "participation" claim even if it turns out that he was mistaken in believing that a Title VII violation occurred. The courts of appeals, however, have divided on the question whether the employee's mistake must be reasonable and in good faith.[18] This Court has yet to address the issue.[19]

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[18] Some circuits have said that employees are protected under section 704 even for filing baseless or malicious EEOC charges, while others have rejected this view. Compare, for example, *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (reasonableness not required); and *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (maliciousness in EEOC charge not sufficient to justify dismissal); with *Balazs v. Liebenthal*, 32 F.3d 151, 158-160 (4th Cir. 1994) (clearly baseless EEOC charge not protected); *Learned v. City of Bellevue*, 860 F.2d 928, 932-933 (9th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989) (reasonableness required); and *Gupta v. Florida Board of Regents*, 212 F.3d 571, 586-87 (11th Cir. 2000) (reasonableness and good faith required). *See also Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989) (interpreting parallel provision in ADEA to require reasonableness and good faith).

[19] Reasonableness is an objective test, while good faith is subjective. In this case, the district court found Johnson's belief to be both objectively unreasonable and subjectively in bad faith. App. 79a, 83a. Because the district court's determination of unreasonableness is correct as a matter of law and should suffice to permit Johnson's dismissal from his position as Vice

Although this case does not require a resolution of this conflict for all employees, we do petition the Court to consider whether the requirement of reasonableness is appropriate when a senior personnel officer claims that his employer wrongly dismissed him for filing an EEOC charge.[20] An employer who hires a high-level officer for personnel matters, including the specific task of assuring compliance with Title VII and other anti-discrimination laws, is entitled to expect a certain level of competence in this officer's performance of his duties. A senior personnel officer who *unreasonably* believes that his employer has violated Title VII does not satisfy this level of competence.[21] Accordingly, the employer should be permitted to dismiss a senior personnel officer for the specific reason that the officer unreasonably has charged the employer with violating Title VII.[22]

President of Human Resources, there is no need for this Court to consider Johnson's subjective intent in filing his EEOC charge.

[20] The courts of appeals have struggled specifically with section 704 retaliation claims raised by senior personnel officers. *See* R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. Tex. L. Rev. 95, 124-136 (1994).

[21] *Cf. Amos v. Housing Auth. of the Birmingham District*, 927 F.Supp. 416, 422 (N.D. Ala. 1996) (upholding termination of EEO staff member for filing a baseless age discrimination claim because, in light of employee's extensive training and experience in EEO matters, she could not have reasonably believed that her claim had merit).

[22] Some courts of appeals have held that the inherent act of a personnel officer filing an EEOC charge against the employer is a "conflict of interest," justifying dismissal, given that it is specific duty of this particular position to represent the employer on EEOC-related matters. *See Smith v. Singer Co.*, 650 F.2d 214, 216-217 (9th Cir. 1981); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980). *See also Jones v. Flagship International*, 793 F.2d 714, 726 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (suggesting that such a conflict of interest may justify termination). This view, however, arguably might

Applying this reasonableness standard here, it is evident that Johnson did *not* act reasonably in charging that the University had violated Title VII by diminishing his influence because he advocated greater efforts at affirmative action. As the University's senior personnel officer, with supervisory authority over all employment-related matters (including Title VII compliance), Johnson should have known that deficiencies regarding affirmative action were not themselves violations of Title VII. Thus, Johnson also should have known that he was not opposing Title VII violations when he was protesting what he saw as non-compliance regarding affirmative action. For this reason, the proper disposition of Johnson's "participation" claim is to hold (as the district court did) that his EEOC filing was unreasonable as a matter of law and, therefore, a legitimate ground for terminating him as the University's senior personnel officer.

The Sixth Circuit's contrary determination (that Johnson "could have reasonably believed that he had a viable discrimination claim on the basis of his advocacy right as an affirmative action representative," App. 38a) is especially pernicious. This Court, therefore, should grant certiorari on this issue to forestall the mischief that the Sixth Circuit's decision otherwise will cause. If employers may not dismiss senior personnel officers who unreasonably believe that deficiencies in affirmative action violate Title VII, then employers will face an inappropriate incentive to curtail affirmative action in the first place. Upon hiring personnel officers, employers may be tempted to say that they want no advocacy from

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go too far (since it would deprive a senior personnel officer of the right to file even a reasonable charge on his own behalf), and in any event is unnecessary to a proper resolution of this case. As long as an employer may dismiss a senior personnel officer for acting unreasonably (as Johnson's EEOC charge certainly was, for the reasons we next explain), an employer's legitimate interests are adequately protected.

these officers on behalf of affirmative action, and therefore these officers must clearly understand that such advocacy would be insubordination.[23] This perverse incentive neither serves the goals of affirmative action nor is called for by a proper construction of the "participation" clause of Title VII. Instead, a sensible application of the "reasonableness" standard will enable employers to pursue the goals of affirmative action, but at the same time dismiss senior personnel officers who have acted inappropriately in the performance of their duties.[24]

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[23] *Cf. Whatley v. Metro. Atlanta Rapid Transit Authority*, 632 F.2d 1325, 1329 (5th Cir. 1980) (permissible to fire a personnel officer who, among other things, participates in an EEOC proceeding in a way contrary to employer's specific directives).

[24] Furthermore, any standard other than "reasonableness" would raise serious questions of federalism, if state agencies (like the University here) were liable under Title VII for discharging high-level personnel officers who perform unreasonably and thus incompetently. *Cf. Gregory v. Ashcroft*, 501 U.S. 452 (1991). Although we do not present a separate federalism-based question in this petition, this constitutional concern is an additional reason to address the Sixth Circuit's misinterpretation of Title VII.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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